

Molinari v ISS Facility Servs., Inc.

2019 NY Slip Op 31729(U)

June 21, 2019

Supreme Court, New York County

Docket Number: 151112/2017

Judge: Alexander M. Tisch

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At an I.A.S. Part 18 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 111 Centre Street, Borough of New York, City and State of New York, on the ____ day of _____ 2019

P R E S E N T:

HON. ALEXANDER M. TISCH, J.S.C.

JOY MOLINARI,

MOTION SEQ. NO. 002

Plaintiff(s),

-against-

ISS FACILITY SERVICES, INC.,

INDEX NO.:
151112/2017

Defendant(s).

The following papers numbered 1 to read on this motion

NYSCEF Doc. Nos.

Notice of Motion, Affirmation, Exhibits

19-27

Answering Affirmation

28-29

Alexander M. Tisch, J.:

Upon the foregoing papers, defendant moves this Court for an order dismissing plaintiff's entire action pursuant to CPLR 1021 due to plaintiff's failure to move to substitute a legal representative for plaintiff's estate within a reasonable time after plaintiff's death and CPLR 3216 based on plaintiff's failure to prosecute this case and respond to defendant's written demand. For the reasons set forth below, the motion is denied.

The defendant, ISS Facility Services, Inc., contends that the case should be dismissed because it has been more than a year since the plaintiff's counsel was informed of Ms. Molinari's death and there has been no action taken to appoint an estate representative to substitute the deceased plaintiff. The defendant also argues that the plaintiff has failed to respond to a CPLR 3216 notice and resume prosecution within ninety-days of the defendant's written demand.

In opposition, the counsel to the plaintiff, the late Ms. Joy Molinari, argues against dismissal pursuant to CPLR 1021 because the defendant has not satisfied the statutory requirement in the event of substitution due to a party's death. Specifically, there has not been a motion by order to show cause, with court-directed notice to the persons interested in the decedent's estate, as to why the action should not be dismissed. The plaintiff's counsel also argues that the defendant's motion to dismiss for failure to prosecute should also be denied because defendant's written demand, which was served while the case was stayed due to plaintiff's death, was a nullity.

A. Defendant's motion to dismiss for failure to substitute

Pursuant to CPLR 1021, an action may be dismissed if substitution is required and not made within a reasonable time. However, "[i]f the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed" (CPLR 1021). Therefore, if "no persons interested in the decedent's estate were provided any notice of the defendants' . . . motions to dismiss the complaint pursuant to CPLR 1021," a trial court is divested of jurisdiction to decide a party's motion to dismiss for failure to substitute (see Gonzalez v Ford Motor Co., 295 AD2d 474, 475 [2d Dept 2002]; see also Noriega v Presbyterian Hosp., 305 AD2d 220, 221 [1st Dept 2003]; Petty v Meadowbrook Distrib. Corp., 266 AD2d 88, 88 [1st Dept 1999]). Moreover, if the notice was solely provided to the attorney representing the decedent, such notice would not satisfy the statutory requirement of CPLR 1021 because the party's death has revoked her attorney's authority to act (see Gonzalez, 295 AD2d 475 ["[a]lthough notice was provided to the law firm which represented the [decedent], such service was insufficient [for the court] to obtain jurisdiction over the persons interested in the

decedent's estate"]; see also Rumola v Maimonides Med. Ctr., 37 AD3d 696, 698 [2d Dept 2007]).

Here, it has been more than a year since the plaintiff Ms. Molinari has died, an estate representative has not been appointed to substitute the decedent. The defendant has moved by notice of motion, but with notice only to Monaco & Monaco, LLP, the counsel to the plaintiff prior to her death. The defendant has not moved for the court to order the persons interested in Ms. Molinari's estate to show cause why the case should not be dismissed. Since the notice provided to the plaintiff's counsel did not satisfy the requirement for defendant's motion to dismiss pursuant to CPLR 1021, this Court has no jurisdiction to decide on this motion (see id.).

B. Defendant's motion to dismiss for failure to prosecute

"Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue," the court upon motion, with notice to the parties, may dismiss an action for failure to prosecute (see CPLR 3216 [a]). To dismiss an action pursuant to CPLR 3216, the following conditions precedent must have been complied with: (a) at least one year has elapsed since the joinder of issue; (b) movant served the party against whom such relief is sought with a written demand to resume prosecution and file a note of issue within ninety days; and (c) the party upon whom is served the demand failed to resume prosecution or file a note of issue within the ninety-day period (see CPLR 3216 [b]; Baczowski v. D.A. Collins Const. Co., Inc., 89 NY2d 499, 503 [1997]).

The Court of Appeals has observed that CPLR 3216 "is extremely forgiving of litigation delay" (see Baczowski, 89 NY2d 499). "If a party fails to comply with a 90-day demand to

serve and file a note of issue, but demonstrates a ‘justifiable excuse for the delay and a good and meritorious cause of action’ the trial court may not dismiss the action” (see CPLR 3216 [e]; Di Simone v. Good Samaritan Hosp., 100 NY2d 632, 633 [2003]).

Furthermore, in the event of a party’s death, the court is divested of jurisdiction to conduct proceedings until proper substitution is made pursuant to CPLR 1015 (a), therefore barring the court from ruling on a motion to dismiss for failure to prosecute (see Silvagnoli v. Consol. Edison Emps. Mut. Aid Soc., 112 AD2d 819, 820 [1st Dept 1985] “[t]he death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made”]; see also Meehan v. Washington, 242 AD2d 286, 287 [2d Dept 1997]).

Here, the defendant joined the issue to this action more than a year ago on November 20, 2017. After plaintiff Ms. Molinari’s death, this case was officially stayed on April 25, 2018. On January 3, 2019, defendant ISS served plaintiff Ms. Molinari a ninety-day notice to prosecute pursuant to CPLR 3216. Subsequently, the plaintiff has failed to respond to the defendant’s written demand by either resuming prosecution or filing a note of issue within the ninety-day period. Like Silvagnoli (112 AD2d 820), the Court is divested of jurisdiction to decide on the defendant’s motion to dismiss for failure to prosecute until a proper substitution of Ms. Molinari was made pursuant to CPLR 1015 (a).

Accordingly, it is hereby ORDERED that the motion is denied. This shall constitute the decision and order of the Court.

ENTER,



HON. ALEXANDER M. TISCH

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J.S.C.